

HON. BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

ERWIN SINGH BRAICH,

Plaintiff,

v.

STEVE MITTELSTAEDT; KEITH M.
OLSON; THE CITY OF
BELLINGHAM; TYLER LETEY;
SHREE SHARMA; THE STATE OF
WASHINGTON; BRIAN G. McLEAN;
McLEAN & ARMSTRONG; ROBERT
RUSKO; DAVID WOOD; KPMG, INC.;
KPMG LLP; RCMP SARGEANT TIM
ALDER; THE GOVERNMENT OF
CANADA; and JOHN/JANE DOES 1-
10,

Defendants.

No. 2:07-cv-00177-BHS

REPLY IN SUPPORT OF THE KPMG
DEFENDANTS' RENEWED MOTION
TO DISMISS

NOTE ON MOTION CALENDAR:
January 9, 2008

I. INTRODUCTION

In February of 2007, Plaintiff Erwin Singh Braich filed this lawsuit against the KPMG Defendants for actions relating to their administration of his bankrupt Canadian estate. The KPMG Defendants informed Braich in April of 2007 that his lawsuit violates Canadian law, which requires that a bankrupt seek leave of court prior to suing his trustee for acts relating to the bankruptcy. The Supreme Court of British Columbia has since

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1 indisputably confirmed that Braich's maintenance of this lawsuit against the KPMG
 2 Defendants violates Canadian law. Instead of abiding that Canadian law, which based on
 3 comity principles this Court should enforce, and seeking leave as required by that law,
 4 Braich has elected to appeal the British Columbia Supreme Court's order against him. As
 5 described below, the fact of that appeal does nothing to alter the British Columbia Supreme
 6 Court's clear pronouncement regarding the illegality of Braich's conduct under Canadian
 7 law. For the reasons described here and in the KPMG Defendants' Renewed Motion to
 8 Dismiss, this Court should grant effect to that Canadian law and dismiss Braich's lawsuit
 9 against the KPMG Defendants.

10 II. BACKGROUND

11 On November 29, 2007, Defendants KPMG Inc., KPMG LLP, Robert Rusko, and
 12 David Wood (collectively, the "KPMG Defendants") filed a Renewed Motion to Dismiss
 13 (Dkt. # 93). In that motion, in response to an inquiry from the Honorable John C.
 14 Coughenour, the KPMG Defendants reported that the Supreme Court of British Columbia
 15 in Bankruptcy had determined that (a) Section 215 of the Canadian Bankruptcy and
 16 Insolvency Act ("BIA") applied to Plaintiff Erwin Singh Braich's ("Braich") claims against
 17 the KPMG Defendants, and (b) that under Canadian law BIA Section 215 is intended to
 18 apply extraterritorially. *See* Renewed Motion to Dismiss at 4-7. Therefore, Braich's
 19 lawsuit against the KPMG Defendants, prosecuted without having obtained leave of the
 20 Canadian court as required by BIA Section 215, indisputably violates Canadian law. *See*
 21 Reasons for Judgment (App. A. to the Renewed Motion to Dismiss) ¶ 56 ("Braich cannot
 22 advance any claims *including the Washington claim* against any of the Applicants or any
 23 other party arising from his bankruptcy without first obtaining leave from this Court as
 24 required by the provisions of s. 215 of the BIA.") (emphasis added).

25 The KPMG Defendants then answered a second question posed by the Honorable
 26 Judge Coughenour – whether, as a matter of comity, this Court should enforce Canadian

1 law and dismiss this action as to the KPMG Defendants as required by BIA Section 215.
 2 *See id.* at 7-12. For the reasons set forth in the Renewed Motion to Dismiss, principles of
 3 comity – indeed, every factor this Court should consider when determining whether it
 4 should recognize Canadian law – favor giving effect to that law in this case and dismissing
 5 Braich’s lawsuit for failure to abide by BIA Section 215.

6 Having sought and obtained an extension of time to respond to the KPMG
 7 Defendants’ Renewed Motion to Dismiss, Braich filed a declaration in opposition to the
 8 KPMG Defendants’ motion and two other motions filed by other defendants.¹ *See*
 9 Plaintiff’s Response to the Defendants’ Motion to Dismiss or, in the Alternative, for
 10 Summary Judgment (Dkt. # 116) (“Braich’s Response”). Braich’s Response did not
 11 address the KPMG Defendants’ comity argument. Indeed, of the sixty six paragraphs of
 12 Braich’s lengthy submission, *only two paragraphs* – Paragraphs 64 and 65 – are directed
 13 toward the KPMG Defendants’ Renewed Motion to Dismiss. *See id.* ¶¶ 64-65. Instead of
 14 substantively addressing the KPMG Defendants’ comity argument, Braich merely informs
 15 the Court that he has appealed the decision of the Honorable Chief Justice Brenner of the
 16 Supreme Court of British Columbia. *See id.* ¶¶ 64. For the reasons explained below, the
 17 fact of Braich’s appeal means nothing to this Court’s resolution of the KPMG Defendants’
 18 Renewed Motion to Dismiss, and that motion should now be granted.

19 III. ARGUMENT

20 A. Chief Justice Brenner’s Opinion is the Definitive Statement of Law Regarding 21 Application of BIA § 215 to this Matter.

22 Although Braich does not explicitly make this argument in his declaration, the
 23 KPMG Defendants infer from his declaration he believes this Court should not dismiss his
 24 case on comity grounds until his appeal has been resolved. By failing to address the

25 ¹ Braich filed his response on Saturday, January 5, 2008 – the day after it was due pursuant to this Court’s
 26 order. *See* Order Granting Plaintiff’s Request for Extension of Time to Respond to Dkts. 76, 85, and 93 (Dkt.
 # 114) at 2.

substance of the KPMG Defendants' comity argument, Braich effectively admits that if Chief Justice Brenner's opinion is a correct statement of Canadian law, this matter should be dismissed as to the KPMG Defendants. *Cf.* Local CR 7(b)(2) ("If a party fails to file papers in opposition to a motion, such failure may be considered by the court as an admission that the motion has merit.").

That Braich has appealed Chief Justice Brenner's order in no way affects whether this Court should, pursuant to the well established principles of comity set forth in the Renewed Motion to Dismiss, recognize and give effect to Canadian law as determined in the Reasons for Judgment.² Despite Braich's appeal, Chief Justice Brenner's Reasons for Judgment remain the definitive and binding statement of Canadian law on this issue. Under Canadian law, the decision of a trial judge remains the law until reversed by a higher court. *Meier v. Canada (Minister of Justice)*, [1983] FCJ No. 425, at 3 (TD) (attached as Exhibit A to Tweedale Declaration) (a decision under appeal "remains the law until [the court] is shown to have been in error by a court of higher jurisdiction"). Indeed, even when under appeal, the order of a Canadian trial court "is binding and conclusive on all the world" until modified or reversed by an appellate court:

The order under review is that of a superior court of record, and is binding and conclusive on all the world until it is set aside or varied on appeal. No such order may be treated as a nullity.

Harrison v. Harrison, [2007] BCJ No. 350, at ¶ 24 (CA) (quoting *Canada Transport v. Alsbury*, [1953] 1 D.L.R. 385 (B.C.C.A.)) (attached as Exhibit B to Tweedale Declaration). "[T]he order of a superior court . . . still binds, cannot be questioned collaterally, and has full force until reversed on appeal." *Id.* ¶ 25.

² At Paragraph 64 of his declaration, Braich appears to indicate that the British Columbia Court of Appeal granted leave for his appeal. The Court of Appeal did not grant leave for Braich to appeal. *See* Tweedale Decl. ¶ 4. Rather, because Braich missed the deadline, it granted Braich an extension of time to file his appeal. *Id.* The Court of Appeal's decision to extend the deadline for filing the appeal says nothing about the merits of that appeal, which is as of right. *Id.* ¶¶ 4-5.

Chief Justice Brenner's Reasons for Judgment – in which he concluded this lawsuit against the KPMG Defendants violates Canadian law – is the definitive statement of Canadian law regarding this issue. For the reasons set forth in the Renewed Motion to Dismiss (reasons unchallenged by Braich), Braich's claims against the KPMG Defendants should be dismissed.

B. Delaying Resolution of this Motion Would Prejudice the Defendants.

If this Court elects to defer final resolution of the KPMG Defendants' Motion to Dismiss until after Braich's appeal has been resolved, the KPMG Defendants' interests, other defendants' interests, or both will be unfairly prejudiced.

As described in the contemporaneously filed Declaration of Jonathan Tweedale, there is a strong possibility that Braich's appeal of Chief Justice Brenner's Reasons for Judgment will not be heard until September of 2008. Tweedale Decl. ¶¶ 4-6. The court of appeal may not render its judgment until several weeks or months after that. *Id.* ¶ 7. A conservative estimate for the court of appeal's resolution of Braich's appeal is therefore October or November of 2008.

The KPMG Defendants are confident that Chief Justice Brenner's Reasons for Judgment will be upheld and the court of appeal will find that Braich's prosecution of this lawsuit without obtaining leave of court violates Canadian law that is meant to be applied extraterritorially. If, as the KPMG Defendants expect, the court of appeal upholds Chief Justice Brenner's Reasons for Judgment, Braich may seek leave to appeal that decision to the Supreme Court of Canada. *See id.* ¶ 8. Such an appeal would not be as of right. *See id.* Whether the Supreme Court of Canada would grant leave for Braich to appeal the court of appeal's decision may not be resolved until *nine months or more after* the court of appeal issues its decision. *See id.* ¶¶ 8-9. The parties therefore may not know whether the Supreme Court of Canada will hear Braich's appeal until *July or August of 2009*. If the Supreme Court of Canada grants leave to appeal, judgment on that appeal may not be

1 rendered until *one year after* leave is granted. *See id.* ¶¶ 10-11. Braich’s appeal of Chief
 2 Justice Brenner’s Reasons for Judgment therefore may not be finally resolved until *July or*
 3 *August of 2010 – nearly three years from now.*

4 Trial in this matter is presently set for November 17, 2008. A cursory review of the
 5 Complaint reveals that there exists at least the possibility of extensive discovery. If this
 6 matter is not dismissed, The KPMG Defendants would endure extreme prejudice in
 7 preparing for and participating in the trial of an action the Supreme Court of British
 8 Columbia has determined violates Canadian law. To avoid this unfair prejudice, if this
 9 Renewed Motion to Dismiss is not granted the KPMG Defendants may seek a stay of this
 10 action pending the outcome of Braich’s appeal. Such a stay – to which the KPMG
 11 Defendants believe they would be entitled given Chief Justice Brenner’s clear statement of
 12 Canadian law regarding this matter and the comity United States courts grant, almost as a
 13 matter of course, to Canadian judicial proceedings – has the potential to prejudice other
 14 defendants in this action, who no doubt want this matter quickly resolved.

15 The KPMG Defendants respectfully submit that Braich’s lawsuit against them is the
 16 very kind of harassment BIA Section 215 is designed to prevent. As described in Chief
 17 Justice Brenner’s Reasons for Judgment, to obtain leave under Section 215, a petitioner
 18 must demonstrate that the proposed action “is not frivolous or vexatious and that the
 19 evidence discloses a cause of action.” Reasons for Judgment ¶ 20 (citing *Down v. Arthur*
 20 *Andersen Inc.*, 2003 BCSC 1286 ¶ 6). The only conceivable reason Braich has not applied
 21 for leave as required by Canadian law is that he doubts he can meet this “relatively low”
 22 standard. *Id.* ¶ 21. This Court should not permit Braich to continue to misuse the courts of
 23 this country in violation of Canadian law.

IV. CONCLUSION

For all of the foregoing reasons and the reasons set forth in the Renewed Motion to Dismiss, Braich's lawsuit against the KPMG Defendants should be dismissed.

Respectfully submitted, this 9th day of January, 2008.

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